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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
BCIS, AAO, 20 Mass, 3/F  
Washington, DC 20536

File: LIN 02 027 50151

Office: NEBRASKA SERVICE CENTER

Date: MAY 14 2003

IN RE: Petitioner:  
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner.  
*Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

*Robert P. Wiemann*  
for Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Nebraska Service Center and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a seafood and fisheries operation that seeks to employ the beneficiary in the United States as its president for a period of two years. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary's position in China and the proposed position in the United States satisfy the definition for "executive capacity."

The record indicates that the purpose of the transfer of the beneficiary is to again "start-up" the operations of the petitioning company in the United States.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulations at 8 C.F.R. § 214.2(1)(3) state that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.

- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

The petitioner is a corporation that originated in the State of Washington on March 7, 1997. The petitioner filed its petition on November 2, 2001. Since the petitioner had been doing business for more than one year at the time the visa petition was filed, it shall not be considered under the regulations covering the start-up of a new business.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The first issue in this proceeding is whether the petitioner has established that the beneficiary has been employed abroad for one continuous year within the three years preceding the filing of the petition in a primarily managerial or executive capacity by a qualifying organization.

On appeal, the petitioner describes the beneficiary's job

duties abroad as follows:

With regard to his position in SDS China, Mr. [REDACTED] has been working in a position of managerial capacity since 1999. In the position of Deputy Manager of the Business Department, Mr. [REDACTED] co-manages the Business Department of SDS China with another SDS China employee. Supervising six staff and two professionals, including a quality control specialist and an international marketing analyst, he has the authority to recommend the hiring, firing and promotion of personnel of the Business Department.

The beneficiary's entire department abroad had ten employees including the beneficiary. As deputy manager, he was the second in charge in this small department and only co-managed this group of employees. It is determined that record contains insufficient evidence to demonstrate that the beneficiary has been acting in a managerial or executive capacity abroad. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. For this reason, the petition may not be approved.

The next issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, counsel describes the beneficiary's proposed job duties in the United States as follows:

(1) Subject to the approval of this petition, Mr. [REDACTED] will control and direct SDS USA's daily business operations, which includes the import and export of seafood products, contract negotiation, promotion and marketing, all of which are major components of SDS USA's operation.

(2) Mr. [REDACTED] will design and execute the company's annual business plan and establish budget for the company, which will then be submitted to SDS USA's parent company. Shanghai Deep Sea Fisheries Co. ("SDS China") in Shanghai, China. This satisfies an executive's duty of establishing goals and policies of the organization.

(3) Mr. [REDACTED] will participate in major undertakings with respect to finance, personnel and other important administrative decisions of the company. In other words, Mr. [REDACTED] will be the primary decision maker of SDS USA.

(4) Mr. [REDACTED] will report directly to the Board of Directors and President of SDS China, and will only

receive direction from them regarding the operation of SDS USA.

On appeal, counsel indicates that the petitioner believes that hiring an assistant to the president and a sales person would be sufficient in the near term for cost-effective reasons for the United States entity. Counsel states that however, in order to comply with the relevant immigration regulations, the petitioner will hire two employees of managerial nature, namely, a sales/marketing manager and an office manager.

The petitioner's assertions concerning the managerial and executive nature of the beneficiary's future duties are not persuasive. Counsel's description of the beneficiary's proposed job duties is not sufficient to warrant a finding of managerial or executive job duties. It is noted that the assertions of counsel (or a representative) do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec.533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 BIA 1980). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The record reveals that at the time of filing the petition, the petitioner did not have any staff to relieve the beneficiary from performing non-qualifying duties. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary will be managing or directing the management of a function, department, subdivision or component of the company upon his entry into the United States. The petitioner has not shown that the beneficiary will be functioning at a qualifying senior level within an organizational hierarchy.

In this case, the evidence submitted is insufficient to establish the beneficiary will be acting in a managerial or executive capacity. The planned addition of two new employees sometime after the beneficiary enters the United States does not enhance the beneficiary's eligibility for this classification at the time the petition was filed. For this additional reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.